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No. A-56

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

MASTER PRINTERS ASSOCIATION, A Division of Printing Industry of Illinois,
Petitioner,

v.

RAYMOND J. DONOVAN,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED

1. Whether it is a violation of the constitutional rights of trade association members to require an association that is subsequently held to have engaged in persuader activities within the meaning of Section 203(b) of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 433(b) (1982), to disclose the identity and the amount of dues and other financial contributions of all members, even though said persuader activities were confined to only a small number of association members and even though said persuader activities were rendered unbeknownst to all but the members involved in such activities.

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The short decision of the United States Court of Appeals for the Seventh Circuit, adopting the decision of the United States District Court for the Northern District of Illinois, is reported at 699 F.2d 370. The order of the United States Court of Appeals for the Seventh Circuit denying rehearing *en banc* is unreported. The decision of the United States District Court for the Northern District of Illinois is reported at 532 F.Supp. 1140. The district and circuit court decisions are reprinted in the Appendix to this Petition.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit entered judgment in this case on January 31, 1983. Petitioner filed a Petition for Rehearing and Suggestion of Rehearing *en banc*, which was denied on May 12, 1983. On July 28, 1982, Petitioner requested enlargement of the time to petition this Court for writ of certiorari to September 26, 1983. The Court granted permission by order dated July 29, 1983.

Jurisdiction to hear this case is conferred upon this Court by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the Constitution of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fifth Amendment provides, in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

Section 203 of the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 433 (1982) provides, in pertinent part:

> (b) Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly—
>
> (1) to persuade employees to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing; or

(2) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding;

shall file within thirty days after entering into such agreement or arrangement a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing the name under which such person is engaged in doing business and the address of its principal office, and a detailed statement of the terms and conditions of such agreement or arrangement. Every such person shall file annually, with respect to each fiscal year during which payments were made as a result of such an agreement or arrangement, a report with the Secretary, signed by its president and treasurer or a statement (A) of its receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and (B) of its disbursements of any kind, in connection with such services and the puropses thereof. In each such case such information shall be set forth in such categories as the Secretary may prescribe.

(c) Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

STATEMENT OF THE CASE

The Master Printers Association ("MPA" or "Association") represents approximately 800 employers and exists in part to promote open (non-union) printing shops. (App. at 12a.) Toward this end, the Association provides its members with lawful counsel, advice, and service designed to promote progressive labor relations. (App. at 46a.) In 1976, Robert Lindgren, former Executive Director of the Association, delivered speeches to the employees of three member employers. (App. at 47a.)

The Secretary of Labor, acting pursuant to Title II of the Labor Management Reporting and Disclosure Act ("LMRDA" or the "Act"), determined that these three speeches constituted instances of "persuader" activity under Section 203(b) of the LMRDA, 29 U.S.C. § 433(b); he directed that receipts from, and details of all labor relations advice by the Association were reportable to the Secretary pursuant to the requirements of Section 203(b) of the Act. The Secretary and Association subsequently agreed that only details of the "persuader" activity were reportable. The Association filed reports concerning only these three speeches, as required by the Secretary, pursuant to a settlement agreement dated June 9, 1978. (App. at 12a, 47a-48a.)

Subsequent to this submission, however, the Secretary demanded additional reports. He contended, and asserts in this case, that Section 203(b) of the Act requires an association who has engaged in activities pursuant to a "persuader agreement" to disclose not only receipts and disbursements with respect to employer/members who have entered into persuader agreements, but also receipts and disbursements with respect to *any* employer/member, for whom any *non-persuader* labor relations advice or services have been rendered. Using this interpretation, the Secretary has sought to compel the Association to disclose its entire membership list, and all monies received and disbursed in connection with the

Association's non-persuader labor relations advice and services on behalf of *all* of its members. (App. at 44a.)

The Association refused to file the additional report demanded by the Secretary, on the grounds that his interpretation was contrary to the legislative history, statutory scheme and clear meaning of the Act, and would violate the constitutional rights of the Association and its members to freedom of speech, freedom of association, freedom from unreasonable searches and seizures, and due process. The Association also relied on the settlement agreement of June 9, 1978 in refusing to file the additional materials sought by the Secretary. (App. at 47a-48a.)

On April 10, 1980, the Secretary of Labor filed an action in the United States District Court for the Northern District of Illinois seeking to compel the Association to file the additional reports. (App. at 42a.) The parties filed cross-motions for summary judgment on February 3, 1981, with memoranda and affidavits in support thereof. (App. at 11a.)

On December 10, 1981, the United States District Court, Judge Prentice Marshall presiding, granted the Secretary's motion for summary judgment and denied MPA's motion, holding that the Association was required to file the complete reports requested by the Secretary. (App. at 39a.) The Court rejected MPA's contrary interpretation of the Act's requirements and overruled its constitutional objections. Judge Marshall stayed his own order pending appeal on January 27, 1982. The Judge noted that this was a case of first impression in the Seventh Circuit and that MPA had raised "several important statutory and constitutional questions."

MPA appealed the district court's decision, and on January 31, 1983, a panel of the Seventh Circuit, over the strong dissent of Judge Pell, affirmed, adopting the decision of the district court.

REASONS FOR GRANTING THE WRIT

THE DISCLOSURE OBLIGATION IMPOSED BY THE DECISION OF THE COURT BELOW RUNS AFOUL OF A LONG LINE OF DECISIONS OF THE SUPREME COURT AND THE CIRCUIT COURTS OF APPEAL.

The Seventh Circuit ruled in this case that when MPA engaged in "persuader" activity on behalf of three of its members, it incurred the obligation to disclose to the Secretary of Labor the identities of all its eight hundred members, as well as the amount of each member's financial support to the Association. The panel majority rejected the Association's protestations that such a result was neither mandated by the Act nor permitted by the Constitution.

MPA urges this Court to grant review to correct the erroneous conclusion of the court below. That decision has onerous implications that extend far beyond the facts of this case.[1] There are more than 3,300 employer associations in this country, whose memberships span from very few to over two-hundred thousand.[2] One of the reasons employers become members of associations is to pursue commonly shared goals and purposes in anonymity, a constitutionally guaranteed right.

The massive disclosure of what was heretofore considered confidential information which the decision would trigger is irrelevant to the Congressional purpose which prompted enactment of the LMRDA, and would severely "chill" employers in exercising their right to free association. Moreover, the lower court decision is irreconcilable with prior decisions of this Court, and a decision of the

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[1] The Secretary is seeking the same disclosures in litigation pending in the Fourth Circuit. *Master Printers of America v. Donovan*, 108 LRRM 2050 (E.D. Va. 1981), *appeal docketed* No. 82-1990 (4th Cir. Oct. 25, 1982).

[2] 1 Encyclopedia of Associations §§ 1, 16 (17th ed. 1983).

United States Court of Appeals for the Fifth Circuit which raised the identical issue.

A. The Decision Of The Court Below Is Inconsistent With A Long Line Of Decisions Of This Court Which Prohibit Governmental Infringement Of The Right To Associate In Privacy Except When Certain Strict Conditions Are Met.

This Court, long ago affirmed that "[o]ur form of government is built on the premise that every citizen shall have the right to engage in political expression and association. This right was enshrined in the First Amendment of the Bill of Rights." *Sweezy v. New Hampshire*, 354 U.S. 234, 250-51 (1957).[3] Fundamental to free association is the protection of mutual legal and economic interests. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

It is equally well-established that the mere fact of compelled disclosure can violate the right to associate and pursue common goals in privacy. *Buckley v. Valeo*, 424 U.S. 1, 64 (1976); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *NAACP v. Alabama*, 357 U.S. 449 (1958). The vitality of this principle was reinforced this past term in *Brown v. Socialist Workers' 74 Campaign Committee*, 103 S. Ct. 416, 420 (1982), when this Court stated, "'[i]nviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.'" (Citations omitted)

It is a time-honored principle that disclosure laws like the LMRDA, can only withstand constitutional scrutiny

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[3] "Expression and association related to labor issues will frequently constitute political activity which lies at the core of first amendment protections." *Intern. Union, Etc. v. Nat. Right to Work*, 590 F.2d 1139, 1148 (D.C. Cir. 1979). However, even "economically motivated association" is protected activity. *Id.*

when there exists a "substantial relationship between the information sought and the government's overriding and compelling interest." *Id.* In order to avoid an unwarranted chill on first amendment rights, such disclosure laws must be drawn with narrow specificity, so that they are the least restrictive means of achieving the governmental end. *Buckley v. Valeo*, 424 U.S. 1, 64-68 (1976); *NAACP v. Alabama*, 377 U.S. 288, 307-8 (1958); *Compare In Re Primus*, 436 U.S. 412, 434 (1978).

Only in rare circumstances has this Court found a governmental interest sufficiently compelling to justify the kind of disclosure required by the decision of the court below. Indeed, such laws have been vindicated only when the "free functioning of our national institutions is involved." *Buckley v. Valeo*, 424 U.S. at 66, *citing Communist Party v. Subversive Activities Control Board*, 367 U.S. 1 (1961); *Uphaus v. Wyman* 360 U.S. 72 (1959), *appeal dismissed*, 364 U.S. 388 (1960) (Court compelled disclosure of list of people at a camp believed to be a communist front); *Konigsberg v. State Bar of California*, 366 U.S. 36 (1961) (inquiry permitted into bar applicant's membership in communist party).[4]

In the present case, the court below paid lip service to the principles governing disclosure statutes, but its anaylsis belies any serious application of those principles to the underlying facts. First, this case is not related to any aspect of national security. As the lower court stated, the purpose of the disclosure obligation in the LMRDA is

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[4] It is noteworthy that in these cases, even while finding the governmental interest "compelling," this Court balanced the interest against mitigating circumstances. For example, in *Uphaus v. Wyman*, 360 U.S. 72 (1959), the information was available from an independent source. In *Konigsberg v. State Bar*, 366 U.S. 36 (1961), the information was made available to a limited number of persons. A profitable comparison does not exist here. The information that the government seeks is and has been maintained on a confidential basis and would, if the government is successful, be made available to the public at-large.

to inform employees of a consultant's interests when the consultant seeks to influence the outcome of a union organization drive. While a legitimate interest, it is hardly compelling, being in no way related to the "free functioning of our national institutions".

Second, the disclosures being sought will not substantially further the government's ends. Indeed, there is *no* reasonable correlation between the LMRDA's purposes, and the revelation of the entire membership list and financial structure of MPA. *See Brown v. Socialist Workers' 74 Campaign Committee*, 103 S. Ct. at 420. The LMRDA was enacted in 1959 after the McClellan Committee hearings. Its purpose was two-fold. It was enacted primarily to curb the abuse of power by union leaders, and secondarily to prevent employers from interfering with union organizing activities by covertly financing the activities of union-busting "middlemen." *Master Printers Ass'n v. Donovan*, 699 F.2d 370 (7th Cir. 1983); *see also* S. Rep. 187, 86th Cong., 1st Sess., *reprinted in* 1959 U.S. Code Cong. & Ad. News, 2318, 2322-23.

The Act's disclosure provisions, then, were intended to publicize the identities of union-busting middlemen, to prevent such activities from influencing employees' voting in organizing campaigns. The assumption was that publication would discourage these activities. In this case there is no question as to the identity of MPA. MPA is an unabashed, outspoken association of employers. No employee could mistake MPA for a neutral third party. It is not a third party at all, since any employer for whom the issue arises is a member. Knowledge of the identity and character of MPA, standing alone, is sufficient to fulfill the congressional goal of identifying for employees any person who might seek to influence their votes in an organizational drive.[5]

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[5] The definition of "employer" in the LMRDA itself clearly contemplates the identity of interest between an employer and an employer association. 29 U.S.C. § 402(e) provides that "employer" means "any employer or any group or association of employers."

Third, as demonstrated by the Fifth Circuit decision in *Familias Unidas v. Briscoe*, 619 F.2d 319 (5th Cir. 1980), the disclosure obligation required by the court below, lacks the specificity mandated by the First Amendment. At most, the statute could require MPA to report the identity and the financial commitment of its three members whose employees the former association executive addressed. Consequently, the decision below exceeds the compass of the long line of decisions in which this Court has artfully crafted the boundaries between permissible and impermissible government intrusions upon members of associations who coalesce for commonly shared goals.

B. The Decision Of The Court Below Cannot Be Reconciled With The Well Reasoned Decision Of The United States Court Of Appeals For The Fifth Circuit, Carefully Circumscribing Governmental Infringement Of The Right To Associate In Private.

The issues raised in *Familias Unidas v. Briscoe*, 619 F.2d 391 (5th Cir. 1980), were virtually identical to those raised here. In *Familias*, the court declared unconstitutional a provision in the Texas Education Code, which authorized a local court to order the "disclosure of the membership of any organization . . . consider[ed] to be engaged in activities designed to interfere with the peaceful operation of the public schools." 619 F.2d at 394. The organization argued strenuously on behalf of its members, that the compelled disclosure was "an impermissible state intrusion upon the rights of association and privacy in association guaranteed . . . by the First and Fourth Amendments (footnote omitted)." *Id.* at 398.

Even while finding the governmental interest in maintaining peaceful schools "compelling," the Fifth Circuit, relying on decisions of this Court, found the Texas statute objectionable in several respects. The Court found no relation between the state's interest and the effect of the statute in subjecting to public recrimination,

> members who not only may not have participated in, but who may not have approved or even been aware of, their organization's involvement in the disruptive activities that triggered the disclosure provision. With respect to these people, disclosure bears no relation at all to the state interest in deterring school disruptions: One cannot be deterred from participating in that which he has already foresworn, nor be dissuaded from supporting that of which he is unaware.

619 F.2d at 401.

The court took note of the fact that this Court had, in several cases, permitted membership disclosures as a "means of deterring groups from engaging in *illicit* activities." 619 F.2d at 400 (citations omitted, emphasis added). The court pointed out that "members of such organizations necessarily knew or should have known of the illicit goals or proclivities of the organizations of which they are a part." *Id.* at 401.

The court expressly disapproved subjecting a "passive member of an historically benign organization" to the consequences of disclosure.

> While disclosure and the attendant public recriminations may be tolerated for knowing members of groups openly avowing unlawful goals, it need not be tolerated for those who have had no reason to anticipate that their organization would engage in proscribed conduct. The Supreme Court seems implicitly to have recognized this principle in *Gibson v. Florida Legislative Investigation Committee*, where, in disallowing compelled disclosures from NAACP membership rolls, it observed at that "this Court 'had upheld . . . legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character.'" 372 U.S. at 547 n.2, 83 S.Ct. at 894 n.2, *quoting Barenblatt v. United States*, 360 U.S. 109, 128, 79 S. Ct. 1081, 1093, 3 L.Ed.2d 1115 (1959).

619 F.2d at 401.

For the same reasons, the disclosure ordered by the court below cannot be permitted. MPA is not an organization avowed to overthrow the government. Nor is its philisophy, doctrines or goals illegal.[6] Thus, the decision of the court below is in stark conflict with the decision of the Fifth Circuit in *Familias Unidas v. Briscoe.*

C. The Court Below Ignored This Court's Instructions To Allow Flexibility In The Kind And Amount Of Proof Required To Demonstrate First Amendment Violations.

The panel majority ran afoul of this Court's admonition to avoid "unduly strict requirements of proof" and to employ "flexibility" in this regard. *Brown v. Socialist Workers*, 103 S. Ct. at 421, *citing Buckley v. Valeo*, 424 U.S. 1, 74. Indeed, "[t]he evidence offered need show only a reasonable probability that the compelled disclosure . . . will subject [members] to threats, harassment, or reprisals from either government officials or private parties." *Id.*

As Judge Pell aptly stated in his dissenting opinion:

> It takes no effort of the imagination to conceive what capital Union organizers could make of the Association: "With a union shop this money which is now paid to an outsider would be coming your way in the form of increased wages." This would be only one example of the use to which the information could be put. As I noted earlier herein, trade unions have been particularly traditionally associated with the printing craft. It is an uneasy situation for the printer wishing to maintain a non-union shop, which it is privileged to do, if a majority of the employees do not desire unionization. I note also the difficulty of getting affidavits from the member-employers on

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[6] Indeed, MPA's right to engage in the activities which gave rise to this action, is guaranteed by the First Amendment and the LMRDA. *See* 29 U.S.C. 433(f) and section 8(c) of the Labor Management Relations Act, 29 U.S.C. § 158(c).

the chilling aspect as the very execution and filing would result in an indirect disclosure of that which is now sought directly.[7]

D. The Decision Of The Court Below Is Inconsistent With Decisions Of This Court Which Constrain The Governmental Infringement Of Free Speech.

This Court has long subjected to strict scrutiny any legislation that deters free expression. The LMRDA's reporting requirement, as construed by the court below, is such a broad requirement that it infringes upon the protected right of employers to communicate with their employees. A similar requirement was disapproved by this Court in *Thomas v. Collins*, 323 U.S. 516 (1945).

In *Thomas v. Collins*, this Court struck down a Texas statute that required similar disclosures from union organizers. At issue was the extent to which the state could restrain union officials from discussing with and informing employees concerning their rights to organize. This Court emphasized the importance of free speech in a labor relations context:

> Free discussion concerning the conditions in industry and the causes of labor disputes appears to us indispensable to the effective and intelligent use of the processes of popular government to shape the destiny of modern industrial society . . . The right thus to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly.

323 U.S. at 532.

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[7] With all due deference to the majority, we agree with Judge Pell that, contrary to Fed. R. Civ. P. 56, "the district court did not accept [MPA's] allegations as true." *Master Printers*, 699 F.2d at 374 (Pell, J., dissenting). Rather, it resolved what it perceived to be disputed issues of fact. This was clearly erroneous. *Dreher v. Sielaff*, 636 F.2d 1141, 1143 n.4 (7th Cir. 1980).

This Court flatly rejected the state's contention that its disclosure law did not censor any protected activity, stating:

> If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment.

Id. at 540.

MPA's members are likewise protected in their right to communicate with their employees. *See* 29 U.S.C. § 203 (f). Yet the Seventh Circuit's overly broad interpretation would deter employers from obtaining professional assistance and advice, thereby necessarily limiting communication with their employees. Thus, review is needed in order to resolve the conflict between the Seventh Circuit decision in this case and *Thomas v. Collins.*

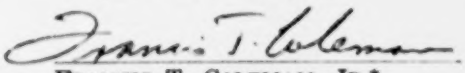
Broad prophylactic rules in the area of free expression have always been inherently "suspect." It is irrelevant whether the deterrent on free expression arises "not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure (footnotes omitted)." *Buckley v. Valeo*, 424 U.S. at 65. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Button*, 424 U.S. 415, 438 (1963); *In re Primus*, 436 U.S. 412 (1978).

The decision of the court below is irreconcilable with these well-established protections. Thus, review by this Court is appropriate for rectifying the misapplication of these important constitutional principles that occurred below.

CONCLUSION

For all of the foregoing reasons, a writ of certiorari should be issued to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,



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APPENDIX

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 82-1459

MASTER PRINTERS ASSOCIATION, a Division of Printing Industry of Illinois,
Defendant-Appellant,

v.

RAYMOND J. DONOVAN, Secretary of Labor, United States Department of Labor,
Plaintiff-Appellee.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 80 C 1768—Prentice H. Marshall, *Judge.*

ARGUED NOVEMBER 30, 1982—DECIDED JANUARY 31, 1983

Before PELL, BAUER, *Circuit Judges,* and TIMBERS, *Senior Circuit Judge.**

BAUER, *Circuit Judge.* The Secretary of Labor initiated this action against Master Printers Association (MPA), alleging that MPA violated section 203 of the Labor

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* The Honorable William H. Timbers, Senior Judge of the United States Court of Appeals for the Second Circuit, is sitting by designation.

Management and Disclosure Act, 29 U.S.C. § 433, by failing to file complete reports of its labor relations activity. MPA defended on the grounds that the Secretary's reading of section 203's disclosure requirements was overly broad and contrary to the legislative history, the statutory scheme and the plain language of the statute. It also contended that by interpreting section 203 to require complete disclosure of persuader and nonpersuader labor relations activity whenever a labor consultant engaged in any persuader activity violated the constitutional rights of MPA and its members to freedom of speech, freedom of association, freedom from unreasonable searches and seizures, and due process.

The parties filed cross motions for summary judgment. The district court granted the Secretary's motion for summary judgment and denied MPA's motion for summary judgment, holding that section 203 required MPA to file the complete reports of all its labor relations activity for any year in which it engaged in some persuader activity. In rendering its memorandum opinion the district court thoroughly and carefully analyzed all the issues raised in this appeal. Accordingly, we affirm and adopt the excellent opinion of the district court, which is reprinted below.

PELL, *Circuit Judge*, dissenting. The memorandum opinion of the district court, by virtue of adoption by the majority of the panel hearing this appeal, is now the opinion of this court. Because I regard the district court's opinion, notwithstanding the thorough and objective analysis it provides in its some 34 pages, to have reached an incorrect result I respectfully dissent.

As a beginning point, it appears important to me to focus on the undisputed facts. One is that the Master Printers Association (Association) is comprised of ap-

proximately 800 printing shops all of which are non-union plants, which status is probably a particularly uneasy one in the traditionally well organized craft of printing. In 1976 the former executive director of the Association delivered on three occasions speeches to employees of three different members employers. The Secretary of Labor determined that these three speeches constituted instances of "persuader" activity under Section 203 of the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 433(b) (the Act). The Secretary's interest in the Association did not stop there, however, as the Secretary demanded reports under the Act not only from the three employers in question but for the other some 797 members; members for whom no "persuader" services had been rendered. In effect and in actuality, the Secretary has sought to compel the Association to disclose its entire membership list and all monies received and disbursed in connection with the Association's non-persuading labor relations advice and services on behalf of all of its members. It is also important to focus on the fact that the Secretary on this appeal concedes that if the three speeches had not been made the Association would not have had to furnish the information now demanded.

The Secretary on this appeal and the district court in its opinion rely heavily on two cases from other circuits, *Douglas v. Wirtz*, 353 F.2d 30 (4th Cir. 1965), *cert. denied*, 383 U.S. 909 (1966); and *Price v. Wirtz*, 412 F.2d 647 (5th Cir. 1969) (en banc). Those two cases involved attorneys who gave advice on labor relations matters but who had gone across the line into direct contact with employees to have become persuaders within the meaning of the Act. *Price*, the later case, even in the limited sphere of contacts of attorneys as contrasted to the broad relationship here involved, came from a closely divided 5th Circuit. The fact that there was a majority opinion joined in by six judges and a strong dissent by

Judge Dyer, joined in by Judges Gewin, Coleman, Ainsworth and Godbold, emphasizes the perilous voyage into the shoals of constitutional violation inherent in the judicial gloss put on the Act by the present majority opinion. An important additional element, and one differing from *Douglas* and *Price*, exists in the present case and that is the associational aspect of this membership organization. Thus, in the present case, it appears to me if the Congress had meant what the Secretary, district court, and the majority opinion of this court say it meant, not only would there have been an infringement of the Association's right of free speech and due process, but an infringement on the First Amendment right of free association.

The pertinent parts of Section 203 of the Act involved here read as follows:

> (b) . . .
>
> Every such person [who undertakes persuader activity] shall file annually, with respect to each fiscal year during which payments were made as a result of such an agreement or arrangement, a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing a statement (A) of its receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and (B) of its disbursements of any kind, in connection with such services and the purposes thereof. In each such case such information shall be set forth in such categories as the Secretary may prescribe.
>
> (c) Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal

> of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

I find it difficult to read (c) other than as a limitation, specifying the boundaries of the report required in (b) as those instances where only those employers to whom or at which persuader activities were provided and eliminating from the scope of (b) those persons who were merely the recipient of advice such as that rendered by the Association in this case. Nevertheless, the district court, accepting what I regard as the weird construction placed on the Act by the Secretary, refers to this as being the clear expression of Congressional intent. Yet elsewhere in its opinion, the district court candidly states that it is "apparent from reading the act that the language of paragraphs (b) and (c) requires reconciliation." The district court then follows with a quotation, which apparently it approves, from Aaron, *The Labor Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 891 (1960):

> Read literally, Section 203(b) seems to compel [the] conclusion [that one persuader activity triggers the requirement of 100% reporting including non-persuader activities]; but the opposite conclusion is indicated by section 203(c), which specifically states that consultants need not report the mere giving of advice to employers, or the representation of employers in an arbitration, administrative, or judicial proceeding. This is another example of the *ambiguities* produced by the inartistic draftsmanship which characterizes much of the statute. (Emphasis added.)

I have a conceptual difficulty in equating clear expression of "Congressional intent" with "ambiguities." Further, the district court while referring to the "potentially con-

fusing language" of the Act then eliminates the potentiality by finding persuasively that the exemption was included in 203(c) merely "to guard against misconstruction." That Congress should legislate in the form of limiting Section 203(c) for the purpose of guarding against misconstruction of Section 203(b) by clarifying what it had just said is scarcely flattering to the legislative draftsmanship.

We have been provided on this appeal with extensive references to the utterances of the members of Congress in connection with the evolution of the Act, including references to its predecessor, pre-cursor, earlier enactments, and, as the district court correctly pointed out, both parties take the position that "the legislative history accompanying the act supports their view." In my examination of the cited legislative history, I agree that both parties could find supportive statements. From my reading, however, this legislative history is valueless for any clear and explicit statement to the effect that one who engaged in a persuader activity as to one employer of labor thereby opens its books as to all other employers "as to whom it has engaged only in advice without the direct persuader activity."

In my opinion, the Association has reconciled the inconsistent two paragraphs so as to give meaning to both sections, which position I think this court would have been well advised to have taken. The Association contends that the "advice" which subsection (c) excludes is that advice given to an employer for whom no persuasion activities are also performed. In other words, if Consultant A has agreements with Employer X to provide advice and persuasion, with Employer Y to provide only advice and with Employer Z to provide persuasion, it would have to include in its annual report all of its receipts and disbursements for X and Z and nothing at all for Y. Advice becomes reportable only when it is done as part of a persuasion agreement or for an employer for whom a consultant also does persuasion.

This construction not only avoids the constitutional problems inherent in the approach by the Secretary and adopted by the district court but gives full effect to Section 203 in its entirety. The district court in its extended opinion emphasizes the danger posed by middlemen in the labor relations field, a strong connection between corruption in the labor field and the activities of management persuaders, and that Congress viewed management persuaders as inherently suspect and their activities subject to abuse in an extremely sensitive field. In the district court's opinion the Congressional concern with persuader activities apparently acquired, at least a majority of the Congressional minds, an evil connotation. Leaving aside the possibly questionable conclusion that employees in today's sophisticated labor market would be more likely to be influenced improperly by direct contact from an outside source than they would be by activities of their own management, the fact remains that under the Act, as construed by the Secretary and not negated by the district court's opinion, the Association could channel information and advice to its some 800 members who could then use that advice and information as their own and in the absence of direct contact between the Association and the employees there would be no duty under the Act to make the full disclosure with which the Association is now confronted.

The construction of the Act advanced by the Association, and the one which I believe is a proper one, is one which avoids the distinct likelihood of constitutional infirmity. The five judges dissenting opinion in *Price v. Wirtz*, *supra*, adverted to the desirability of avoiding constitutional difficulties inherent in the majority's interpretation by a different construction of the Act which would have precluded the disclosure contended for by the Secretary. 412 F.2d at 656. Again it must be borne in mind that the constitutional issues which the dissenters found to constitute grave deficiencies in the majority

opinion did not include the important additional one of freedom of association which exists in the present case. The Supreme Court very recently reemphasized the canon of statutory construction which, in my opinion, is brought into play by the grave constitutional deficiencies existing in the majority opinion. In *United States v. Security Industrial Bank*, —— U.S. ——, 103 S. Ct. 407 (1982) the Court, after considering the potentiality of constitutional violations in the recently adopted Bankruptcy Act, stated that it considered the statutory question because of the

> " 'cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided.' " *Lorillard v. Pons*, 434 U.S. 575, 577 (1978), quoting *Crowell v. Benson*, 285 U.S. 22, 62 (1932).

Id. at 412. Applying this "cardinal principle" of statutory construction, I can reach only one conclusion and that is that all of the language of the two subparagraphs be given effect in the manner set out earlier herein; the construction given by the district court, and adopted by this court, not only renders meaningless some of the language in the subsections but further renders them subject to constitutional attack.

In connection with the chilling effect of the complete disclosure, I am not unmindful that the district court expressed skepticism of the "fears" expressed by the defendants. The court followed this statement of skepticism by stating that even accepting their allegations as true, it did not believe that those allegations made out a claim under the First Amendment. The Court's rationale apparently was that governmental interests were sufficiently important to outweigh the possibility of infringement. But I search in vain for any demonstration of governmental interest in requiring the disclosure of the

membership of the Association when 797 members of the Association have only been potential recipients of advice, when there would have been no disclosure required by the statute if all 800 had received only advice.

Further, unfortunately, the district court did not accept the allegations as true. Affidavits were submitted showing that the order of disclosure did indeed have a chilling effect. Under any circumstances summary judgment was inappropriate. At the very least, there should have been a trial on the matter of whether under the particular labor relations situation here involved there was a chilling impact on the right of free association.

It appears to me, however, on the basis of the affidavits that summary judgment in favor of the Association was appropriate. It takes no effort of the imagination to conceive what capital Union organizers could make of the disclosure of the membership and their payments to the Association: "With a union shop this money which is now paid to an outsider would be coming your way in the form of increased wages." This would be only one example of the use to which the information could be put. As I noted earlier herein, trade unions have been particularly traditionally associated with the printing craft. It is an uneasy situation for the printer wishing to maintain a non-union shop, which it is privileged to do, if a majority of the employees do not desire unionization. I note also the difficulty of getting affidavits from the member-employers on the chilling aspect as the very execution and filing would result in an indirect disclosure of that which is now sought directly.

The district court itself recognized that "Congress has specifically provided, and the Supreme Court has held, that employers in the labor relations field are protected under the constitution." I am not aware that the First Amendment right of free association would be treated any differently. The district court quotes approvingly

from *Buckley v. Valeo*, 424 U.S. 1, 64-65 (1976), that there be "'relevant correlation" or "substantial relations" between the governmental interests and the information required to be disclosed. At the risk of being repetitive, I again search in vain for any substantial relationship between governmental interest and the disclosure of the membership data of the entire Association.

The Secretary concedes that if the Association had only engaged in one act of directly speaking to employees of one member of the Association, full disclosure of the other 799 members would have been demanded by the Secretary. On the other hand, if there had been no persuader activity whatsoever there would have been no demand. I cannot regard the result as being other than not only unwarranted but peculiar.

Finally, the district court opines that the act would be less than effective if it permitted the targets of the publicity to be entirely free from public scrutiny where they are able to couch their function as "advice" rather than persuasion. This expression of alarm might have been more persuasive if it were not for the fact that the so-called targets of publicity are concededly entirely free of public scrutiny where they impart information in the form of advice rather than persuasion. The Secretary does not contend otherwise.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 80 C 1786

RAYMOND J. DONOVAN, Secretary of Labor,
Department of Labor,
Plaintiff,

v.

MASTER PRINTERS ASSOCIATION, A DIVISION OF
PRINTING INDUSTRY OF ILLINOIS ASSOCIATION,
Defendant.

MEMORANDUM OPINION

PRENTICE H. MARSHALL, District Judge

This case involves a challenge to the Secretary of Labor's ("Secretary") interpretation of § 203 of the Labor Management Reporting and Disclosure Act ("LMRDA" or "Act"), 29 U.S.C. § 433 (1959). The Secretary seeks to compel defendant, Master Printers Association ("Association") to disclose the names and various aspects of its relationship with clients who receive labor relations advice from the Association. The Association contests the Secretary's interpretation of the Act and alternatively raises several constitutional objections to the disclosure requirements. Both sides have moved for summary judgment pursuant to Rule 56, Fed. R. Civ. Pro. and exhaustive briefs have been filed. The records and files of the case present no genuine issues of material fact and the case is ready for decision.

I

The facts are not in dispute. The Association is an unincorporated trade organization comprised of approxi-

mately 800 non-union printing shops. The purpose of the Association is, in part, to counsel and advise its members on how to keep their employees unorganized. To this end the Association provides a variety of services for its members, including literature, meetings and counseling on how to maintain "open" shops, and establishing credit unions and other benefit programs for the unorganized employees. Affidavit of Robert Lindgren, Exhibit D.

In 1976 the former executive director of the Association made three separate speeches directly to employees of three of its member employers. The Secretary, pursuant to Title II of the LMRDA, Section 203, 29 U.S.C. § 433(b), determined that these speeches constituted "persuader activity" within the meaning of the Act and therefore ordered reports and disclosure of the relationship between the Association and those employers. In addition the Secretary ordered the Association to report the names and disbursement records of all other employers who had received labor relations advice regardless of whether they received persuader services. The Association filed the required reports for the three employers, but refused to comply with respect to its other member-employers. The Secretary instituted this action to compel disclosure. The questions presented here are whether the LMRDA supports the broad disclosure interpretation urged by the Secretary and, if it does, whether the reporting sections of the Act can withstand constitutional scrutiny.

II

The LMRDA grew out of the lengthy and well publicized McClellan Committee investigations into organized labor in the late 1950's.[1] The legislation which ultimately passed after several years of debate and many attempts dealt primarily with insuring internal union

[1] See Interim Report of the Select Committee on Improper Activities in the Labor or Management Field [McClellan Report], S. Rep. 1417, 85th Cong., 2nd Sess. (1958).

democracy and public disclosure of union financial arrangements.[2] In addition, the LMRDA and its precursors, the Kennedy-Ives Bill, S. 3974, 85th Cong., 2d Sess. (1958), the Kennedy-Ervin Bill, S. 505, 86th Cong., 2d Sess. (1959), and finally S. 1555, 86th Cong., 1st Sess. (1959) authored by Senator John F. Kennedy, focused on the influence of "middlemen" employed by management to influence employees in the exercise their rights under § 7 of the National Labor Relations Act (NLRA), 29 U.S.C. § 157 (1976). The Senate Report accompanying the Act explained:

> It is also plain that there are important sections of management that refused to recognize that the employees have a right to form and join unions without interference and to enjoy freely the right to bargain collectively with their employer concerning their wages, working conditions, and other conditions of employment. . . . [Employers] have employed so-called middlemen to organize "no-union committees" and engage in other activities to prevent union organization among their employees. They have financed community compaigns to defeat union organization. They have employed investigators and informers to report on the organizaing activities of employees and unions. It is essential that any legislation which purports to drive corruption and improper activities out of labor-management relations contain provisions dealing effectively with these problems.

S. Rep. 187, 86th Cong., 1st Sess. at 10 *reprinted in* [1959] U.S. Code & Admin. News 2318, 2322-23 (1959).[3]

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[2] The Act contains the so-called Bill of Rights for union members and requires far more extensive reporting and disclosure requirements of unions and their officers than it does of employers and consultants. See §§ 101-105, 201, 202, 301-306, 401-404, 29 U.S.C. §§ 411-415, 431, 432, 461-466, 481-483, 501-504 (1976).

[3] There is a great deal of legislative history accompanying the LMRDA as passed and the two preceeding attempts (Kennedy-

It is clear that Congress did not look favorably on the activity of outside consultants and believed they frequently engaged in practices of questionable legality.

> The committee notes that in almost every instance of corruption in the labor-management field there have been direct or indirect management involvements [sic]. The report of the McClellan committee describes management middlemen flitting about the country on behalf of employers to defeat attempts at labor organization. . . .
>
> The committee believes that employers should be required to report their arrangements with these union-busting middlemen. Further, the Committee on Labor and Public Welfare has received evidence in prior hearings showing that large sums of money are spent in organized campaigns on behalf of some employers for the purpose of interfering with the right of employees to join or not to join a labor organization of their choice, a right guaranteed by the National Labor Relations Act. Sometimes these expenditures are hidden behind committees or fronts; however the expenditures are made, they are usually surreptitious because of the unethical content of the message itself. The committee believes that this type of activity by or on behalf of employers is reprehensible. These expenditures may or may not be

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Ives and Kennedy-Ervin) which failed in the House. The parties at various places in their several briefs refer to reports and comments on all three bills coming from a variety of sources. Unfortunately, while there have been several extensive compilations of the history of this legislation, no one source contains all of the statements relied on by the parties or this opinion. We have drawn from three separate sources: [1959] U.S. Code & Admin. News 2318 (1959); Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, National Labor Relations Board (1959) [hereinafter cited as Leg. Hist. (NLRB)]; Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, Department of Labor (1960) [hereinafter cited as Leg. Hist. (Labor)].

> technically permissible under the National Labor Relations Act . . ., or they may fall in a gray area. In any event, where they are engaged in they should be exposed to public view, for if the public has an interest in preserving the rights of employees then it has a concommitant obligation to insure the free exercise of them.

S. Rep., *supra* at 2326-37.

In response to the problems outlined above the LMRDA provides criminal sanctions for improper payments by middlemen to employees[4] and requires disclosure of the employer-middlemen relationship. Section 203 of the Act, 29 U.S.C. § 433 (1976), provides in relevant part:

> (b) Every person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof is, directly or indirectly—
>
> (1) to persuade employees to exercise or not to exercise, or persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing; or
>
> (2) to supply an employer with information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer, except information for use solely in conjunction with an administrative or arbitral proceeding or a criminal or civil judicial proceeding;
>
> shall file within thirty days after entering into such agreement or arrangement a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing the name under which such person is engaged in doing business

[4] See § 505, 29 U.S.C. § 186 (1976).

and the address of its principal office, and a detailed statement of the terms and conditions of such agreement or arrangement. Every such person shall file annually, with respect to each fiscal year during which payments were made as a result of such an agreement or arrangement, a report with the Secretary, signed by its president and treasurer or corresponding principal officers, containing a statement (A) of its receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof, and (B) of its disbursements of any kind in connection with such services and the purpose thereof. In each such case such information shall be set forth in such categories as the Secretary may prescribe.

(c) Nothing in this section shall be construed to require any employer or other person to file a report covering the services of such person by reason of his giving or agreeing to give advice to such employer or representing or agreeing to represent such employer before any court, administrative agency, or tribunal of arbitration or engaging or agreeing to engage in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any arising thereunder.

It should be apparent from reading the Act that the language of paragraphs (b) and (c) requires reconciliation. What the Act requires in terms of reporting obligations in paragraph (b) it appears to exempt in paragraph (c). As one commentator noted,

> There seems to be some confusion, however, concerning whether a consultant who has an agreement with any one employer to persuade employees or to furnish information must then include in his annual report receipts from, and disbursements on behalf of, all other employers for whom he has performed labor-

> relations services that would otherwise not have to be reported. Read literally, section 203(b) seems to compel that conclusion; but the opposite conclusion is indicated by section 203(c), which specifically states that consultants need not report the mere giving of advice to employers, or the representation of employers in an arbitration, administrative, or judicial proceedings. This is another example of the ambiguities produced by the inartistic draftsmanship which characterizes much of the statute.

Aaron, *The Labor Management Reporting and Disclosure Act of 1959*, 73 Harv. L. Rev. 851, 891 (1960). It is precisely this ambiguity that we are called upon to resolve in the case at bar.

The Secretary reads § 203(b) to require the reporting of receipts and disbursements for *all* clients who received any labor relations advice if a labor consultant engages in *any* persuader activity.[5] Thus, the Secretary treats the rendering of persuader services as a trigger which compels full disclosure of information otherwise non-reportable under § 203(c). The sole function of paragraph (c) is to exempt from the filing requirements labor consultants who engage in no persuader services and limit their activity to the giving of advice and the representative functions listed in the Act. A consulting firm must confine itself solely to non-persuader activity unless it wants to incur a duty to make financial disclosure as to all its clients, even those who receive only advice outside the scope of direct or indirect employee persuasion. Plaintiff's Memorandum in Support at 6-8.

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[5] The Secretary's view is well presented in a 1965 article by the then Associate Solicitor of the United States Department of Labor. See Beaird, *Reporting Requirements for Employers and Labor Relations Consultants in the Labor-Management Reporting and Disclosure Act of 1959*, 53 Geo. L. J. 267 (1965) [hereinafter cited as Beaird, *Reporting Requirements*].

The defendant offers several counter interpretations of the Act, urging that it can be best reconciled by restricting the reporting requirement to all labor relations services—including advice—to any employer who receives persuader services, but *not* to employers who receive only non-persuader services. Defendant's Memorandum in Support at 20-22.[6] Defendant argues that this interpretation is preferable because the Secretary's reading of the statute renders section (c) a mere repetition of what is already apparent from section (b). *Id.* at 23. Defendant further argues that this interpretation is consistent with the Congressional purpose of focusing the "floodlights of publicity" on those who provide persuader services. Only where there is persuader activity—contact between the consultant and employees—did Congress exhibit a concern sufficient to require the report of receipts and disbursements.

Both parties argue that the considerable legislative history accompanying the Act supports their view; and both sides agree that judicial interpretation to date generally supports the Secretary's interpretation of the Act. *See Douglas* v. *Wirtz*, 353 F.2d 30 (4th Cir. 1965), *cert. denied*, 383 U.S. 909 (1966); *Wirtz* v. *Fowler*, 373 F.2d 315 (5th Cir. 1966) *overruled*, *Price* v. *Wirtz*, 412 F.2d 647 (5th Cir. 1969) (en banc). For the reasons stated below, we find that the Secretary offers the proper construction of the Act and as construed the reporting sections do not violate defendant's constitutional rights.

The Fourth Circuit in *Douglas*, the first case to address the subject reporting requirement of the LMRDA, held, in a 2-1 opinion, that § 203 requires the reporting of all advice given by a labor relations consultant who engaged

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[6] For an argument in support of the defendant's position, see generally, Note, *Two Views of a Labor Relations Consultant's Duty to Report Under Section 203 of the LMRDA*, 65 Mich. L. Rev. 752 (1967) [hereinafter cited as Note, *Two Views*].

in even a single instance of persuader activity. The Fifth Circuit initially took the contrary view in *Wirtz* v. *Fowler*, but reversed itself, *en banc*, in *Price* v. *Wirtz*.

The *Douglas* court recognized the apparent conflict between paragraphs (b) and (c) and held "[a] reasonable reconcilation . . . is to compel the reporting of all income and expendituures in connection with labor relations advice and services, given or rendered aside from the persuasion activities, if the [consultant] has within the same reporting period also either acted or received payment as a persuader under § (b)(1)." *Douglas* at 32. The court focused on the "by reason of" language in section (c) and concluded:

> . . . advice in itself and alone does not create an obligation to report. But the two sections together declare that when persuasion services or receipts therefor and independent advice occur in the same fiscal year, all of them must be reported. *Id.*

In addition, *Douglas* relied on passages from two Senate Committee reports which indicate that a consultant who "confines himself to giving legal advice" or other activities listed in 203(c) need not report. *Douglas* at 33, *quoting* S. Rep. 187, *supra*. By using the word "confines" Congress intended that any provision of persuader services forfeited the exemption. *Id.* The opinion of the Fifth Circuit in *Price* follows the *Douglas* reasoning. *See Price* at 649. The court stated the matter succintly: "[Disclosure of all labor relations advice is the price the attorney-persuader must pay if he wishes to engage in those activities." *Id.* at 650.

Defendant vigorously contends that the Fourth and Fifth Circuit erred in their construction of the Act. We disagree. The Association's principal argument is that the *Douglas* interpretation renders section (c) meaningless—a mere "truism that the non-reportable giving of advice does not give rise to a duty to report." Note, *Two Views*,

at 756. They also contend that by using the language "an object" in section (b) the drafters indicated disclosure is required only where advice is accompanied by persuasion—i.e. the argument has more than one object. Finally, defendant relies on a number of comments in the extensive legislative history indicating that the main thrust of Congressional concern was persuader activity, not the giving of advice outside persuader agreements.[7]

Contrary to defendant's argument, our reading of the statute does not render section (c) meaningless. Rather, it stands as a gloss on the potentially confusing language of section (b) and indicates that engaging in the activities listed in section (c) does not, in and of itself, give rise to a duty to report. The opening language of section (c), "Nothing in this section shall be construed to require . . .", supports the view of (c) as a clarification designed to avoid confusion. Moreover, the committee report accompanying the Kennedy-Ives Bill, where the management disclosure requirement originated, states:

> Section 103(b) requires a labor-relations consultant to file a financial report upon his labor-relations activities if he undertakes to influence or affect employees in the exercise of their rights guaranteed by the [NLRA] . . . Since attorneys at law and other responsible labor-relations advisors do not themselves engage in influencing or affecting employees in the exercise of their rights . . . an attorney or other

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[7] Plaintiff, in its initial brief addressing the statutory question at issue, relied on the statements of two opponents of the Act. It has frequently been stated, and defendant was quick to point out in response, that reliance on the statements of opponents is inappropriate when construing an act. *See* NLRB v. Fruit Packers, 377 U.S. 58, 66 (1964); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951). We assure defendant that we have placed no stock in the interpretation offerred by these opponents and rely instead on the legislative history and statutory language cited herein.

> consultant who confined himself to giving advice, taking part in collectively bargaining and appearing in court and administrative proceedings [would not] be required to report. *Although this would be the meaning of the language of the section 103(a) and (b) in any event, a proviso to section 103(b) guards against misconstruction.*

S. Rep. 1684, 85th Cong., 2d Sess. (1958) *reprinted in* Leg. Hist. (Labor) at 390 (emphasis added).

Both parties agree in their briefs that reliance on commentary to the Kennedy-Ives Bill is appropriate because it is similar in content and structure with the LMRDA. Section 103(b) referred to in the quoted comment is almost identical with section 203(c) of the Act. The proviso in the original bill ultimately became section 203(c). Thus, the statement that the exemption is included merely to guard against misconstruction is particularly persuasive.[8] Further, we agree with the courts

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[8] The relevant section of the Kennedy-Ives Bill, S. 3974, is as follows:

> (b) Every person engaged in providing labor relations consultant service to an employer engaged in an industry affecting commerce pursuant to any agreement or arrangement under which such consultant undertakes—
>
> (A) to influence or affect employees in the exercise of their rights guaranteel by Section 7 of the National Labor Relations Act, as amended, or by the Railway Labor Act, as amended, or
>
> (B) to provide an employer involved in a labor dispute with the services of paid informants or investigators, or any agency or instrumentality engaged in the business of interfering with, restraining, or coercing employees in the exercise of rights guaranteed by section 7 of the National Labor Relations Act, as amended, by the Railway Labor Act, as amended, or
>
> shall file annually a report with the secretary [sic], signed by its president and treasurer of corresponding principal officers, containing the following information:

in *Douglas* and *Price* that the "by reason of" language is a strong indication that the purpose of section (c) is to avoid any reliance on the giving of advice alone as a trigger for the consultant's duty to report.

Like the court in *Price*, we believe that the legislative history supports, if it does not compel, this view. *Price* at 650. Defendant places considerable weight on the statement of Senator Kennedy discussing the predecessor legislation:

> The Senate passed bill . . . contained a strong detailed provision requiring employers and middlemen to report transactions and arrangements as well as payments and expenditures for activities intended to influence or affect employees in the exercise of rights guaranteed by the Labor Act.

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(1) the name under which the labor relations consultant is engaged in doing business and the address of its principal place of business;

(2) receipts of any kind from employers on account of labor relations advice or services, designating the sources thereof;

(3) disbursements of any kind, in connection with such services and the purposes thereof; and

(4) a detailed statement of such agreement of arrangement.

Provided, That nothing in this section shall be construed to require a report from a labor relations consultant retained by an employer by reason of his giving advice to such employer or representing such employer in any court or administrative agency or engaging in collective bargaining on behalf of such employer with respect to wages, hours, or other terms or conditions of employment or the negotiation of an agreement or any question arising thereunder.

We note that it is the defendant who urged this court to rely on statements regarding the earlier bills as relevant to the Act "Senator Kennedy's remarks are equally applicable to the language of Section 203 of the Act, since the reporting requirements in the Act are virtually identical in material parts to the requirements of the Kennedy-Ives bill . . ."). Defendant's Memorandum in Support at 28-29).

Cong. Rec., 19033-34 (1958), *reprinted in* Leg. Hist. (Labor) at 486. But no one is arguing in this case, least of all the Secretary, with the contention that persuasion is the principal evil addressed by the statute. The question here is the scope of the reporting obligation incurred by one who has engaged in persuader activity. Senator Kennedy's remarks simply do not address that issue.

The defendant also relies on a statement by Senator Goldwater as one of the Senate conferees that § 203 requires "a report from an employer and labor relations consultant of any agreement or arrangement whereby the labor relations consultant undertakes activities to persuade employees in the exercise of their rights." Defendant's Answering Memorandum at 29. But defendant fails to include Sen. Goldwater's description of the *content* of the report once the duty is incurred:

> First. File a report with the Secretary within 30 days of entering into the agreement or arrangement giving all details concern it.
>
> Second. File annually with the Secretary for the preceeding fiscal year if he received *any* payments pursuant to an agreement or arrangement, a report seting forth *all* receipts from *all* employers, and the sources thereof, on account of labor relations advice or services, as well as any disbursements and their purposes in connection with such services, ...

Leg. Hist. (Labor) at 624.[9]

This interpretation is consistent with the House conferees statement that § 203(c) "grants a broad exemption

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[9] We rely, once again, on defendant's brief for an explanation of Senator Goldwater's role in the legislation. Defendant's Answering Memorandum at 27. While Senator Goldwater was originally an opponent of the bill, he was a member of the conference committee and supported the bill as it emerged from the conference and ultimately became law.

from the requirements of the section with respect to the giving of advice." Conf. Rep. 1147, 86th Cong., 1st Sess., *reprinted in* [1959] U.S. Code & Admin. News, at 2505. Given the Congressional findings regarding the propensity of management middlemen to engage in or encourage unfair labor practices, Congress might have sought to require disclosure of the existence of employer-consultant relationships even where the consultant refrained altogether from persuader activity. Instead, Congress did grant a broad exemption, one given its full scope by our interpretation: any consultant or attorney who "confines himself" to giving advice or the representative functions listed incures no obligation to report. The numerous reports on various versions of the Senate bill ultimately passed by the Congress indicate that the exemption was designed to accomodate those who have nothing to do with attempts to persuade employees in the exercise of their § 7 rights. *See* S. Rep. 187, *supra* at 2356-57. We agree with the courts in *Douglas* and *Price* that once a consultant, such as Master Printers Association, engages in persuasion of employees, they trigger the obligation to report all labor relations advice rendered in that reporting year.

III

The defendant next argues that the Act, if so construed, violates the first amendment rights of the Association and its members. As indicated earlier, the Association was formed, in part, to promote its members' belief in "open" shops. It assists member-employers in the conduct of their labor relations activities. Defendant correctly points out that Congress has specifically provided, and the Supreme Court has held, that employer speech in the labor relations field is protected under the Constitution. See § 8(c) of the NLRA, 29 U.S.C. § 158 (c); *NLRB* v. *Gissel Packing Co.*, 395 U.S. 595 (1969).

The Act, however, does not prohibit any speech by either employers or labor relations consultants. Rather

it compels disclosure of the financial data and clients of those who engage in a certain type of activity. We recognize that it is well settled that compelled disclosure has the potential to infringe upon first amendment freedoms. *See e.g. Gibson* v. *Florida Legislative Investigation Commission*, 373 U.S. 539 (1963); *Louisiana* v. *NAACP*, 366 U.S. 293 (1961); *Bates* v. *Little Rock*, 361 U.S. 516 (1960); *NAACP* v. *Alabama*, 357 U.S. 449 (1958). It is equally well settled that disclosure requirements are permissible provided that the chill placed on a person's first amendment rights is justified by a sufficient purpose behind the legislation. *California Medical Ass'n* v. *FEC*, 101 S. Ct. 2712 (1981); *Buckley* v. *Valeo*, 424 U.S. 1 (1975) (per curiam); *United States* v. *Harriss*, 347 U.S. 612 (1954).

The standard for examining disclosure requirements against first amendment attack was set out and discussed at length in *Buckley* v. *Valeo*, where the Court upheld the reporting and disclosure provision of the Federal Election Commission Act of 1971, 2 U.S.C. § 431 et seq. (1976).[10]

> Since NAACP v. Alabama we have required that the subordinating interests of the State must survive exacting scrutiny. We also have insisted that there be a "relevant correlation" or "substantial relation" between the governmental interest and the information required to be disclosed [citations omitted]. This type of scrutiny is necessary even if any deterrent effect on the exercise of First Amendment rights arises, not through direct government action, but indirectly as an unintended but inevitable result of the government's conduct in requiring disclosure.

424 U.S. at 64-65.

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[10] The FEC requires reporting of any campaign contribution over $10, with additional information for contributions over $100, 2 U.S.C. § 432(c), (d), accompanied by public disclosure of all reported information. 2 U.S.C. § 438(a)(4).

Defendant contends that both it and its members will be chilled in the exercise of their first amendment rights if forced to disclose the existence of their employer-consultant relationship. Defendant asserts that employers who do not use persuader services are discouraged from associating with those who do because they fear "public opprobrium" resulting from organized labor's campaign to "vilify" management consultants. They also fear that reliance on advice from a consultant might become an issue in collective bargaining and employee relations. Finally, defendant argues that the Association itself is chilled because the threat of compelled disclosure of all clients who receive advice, given their clients' desire to keep their relationship private, keeps them from engaging in any direct contact with employees. Defendant's Closing Memorandum at 22-24. As proof of the reasonableness of these fears defendant points to the affidavit of its past executive director attesting to the fact that since the Secretary's order of disclosure the Association has refrained from all persuader activity. Lingren Aff. ¶ 12.

We are somewhat skeptical of the "fears" claimed by the defendant,[11] but even accepting their allegations as true, we do not believe they make out a claim under the first amendment. The Court in *Buckley*, held,

> we have acknowledged that there are governmental interests sufficiently important to outweigh the pos-

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[11] The allegations of chill here, while they are not inconsequential, fall far short of the sort of threat of physical harm and loss of employment found in NAACP v. Alabama and its progeny. At most what defendant has alleged is that its members fear criticism of their business practice of dealing with a labor relations consultant and possible economic harm (though they have not indicated its source) in the conduct of their labor relations. We do not foreclose the possibility that on different facts, with an alleged chill of greater magnitude, the statutory disclosure requirement might have to give way to the first amendment interest. See Buckley v. Valeo, 424 U.S. at 69-72.

> sibility of infringement, particularly when the "free functioning of our political institutions" is involved. [citation omitted].
>
> The governmental interest sought to be vindicated by the disclosure requirements are of this magnitude.

424 U.S. at 66. As in *Buckley*, the governmental interests advanced by the reporting and disclosure provisions of the LMRDA are sufficient to justify any of the chilling effects alleged by the defendants.

We deal here with the unique and pervasively regulated area of labor relations law. Congress has set out one of the most detailed legislative and administrative frameworks in our history to promote the free flow of commerce and replace the economic warfare of the nineteenth century with a system designed to encourage industrial peace. The Supreme Court has recognized that even first amendment rights may be required to yield to the special needs of the labor relations field:

> Any assessment of the precise scope of employer expression, of course, must be made in the context of its labor relations setting. Thus, an employer's rights cannot outweigh the equal rights of the employees to associate freely, ... And any balancing of those rights must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear. Stating these obvious principles is but another way of recognizing that what is basically at stake is the establishment of a nonpermanent, limited relationship between the employer, his economically dependent employee and his union agent, not the election of legislators or the enactment of legislation. . .

NLRB v. *Gissel Packing Co.*, 395 U.S. at 618-19. The Court has permitted restrictions even on the *content* of employer speech by classifying as an unfair labor practice statements outside the scope of well drawn boundaries. *Gissel*, at 618-19; *J.P. Stevens & Co.* v. *NLRB*, 638 F.2d 676, 686 (4th Cir. 1980); *Chromalloy Mining and Minerals* v. *NLRB*, 620 F.2d 1120, 1124 (5th Cir. 1980); *Nebraska Bulk Transport, Inc.* v. *NLRB*, 608 F.2d 311, 314 (8th Cir. 1979); *NLRB* v. *Gogin*, 575 F.2d 596, 600 (7th Cir. 1978).

In a labor setting "the Court has concluded that an employer's freedom to communicate his views to his employees may be restricted by the requirement that any predictions 'be carefully phrased on the basis of objective fact' " even though "[s]uch restrictions would clearly violate First Amendment guarantees if applied to political expression concerning the election of candidates for public office." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council*, 425 U.S. 748, 778 (1978) (Stewart, J., concurring). Clearly, the context of the regulation sets the framework for our first amendment analysis. *Id. See also Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978).

The reporting and disclosure provisions of the LMRDA are supported by extensive findings of the danger posed by middlemen in the labor relations field. In its declaration of findings, purposes and policy, made part of the statute, Congress stated:

> The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests

> of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives.

§ 2(b), 29 U.S.C. § 401(b).

The record is replete with evidence that Congress believed that "union busting" management middlemen were working with employers to undermine employees in their attempt to exercise their § 7 rights. Those activities include direct employee contact, spending large sums of money behind the scenes or through committees to distribute distorted information, setting up company dominated unions, and other practices that Congress felt were unethical if not illegal. S. Rep. 187, *supra*. See also, Cong. Rec. 11374-77, 86th Cong., 1st Sess. (1959), *reprinted in* Leg. Hist. (Labor) at 561-63. The Senate Committee concluded:

> All of the activities required to be reported by this section are not illegal nor are they unfair labor practices. However, since most of them are disruptive of harmonious labor relations and fall into a gray area, the committee believes that if an employer or a consultant indulges in them, they should be reported.

S. Rep. at 187, *supra* at 2328. Thus, it appears that the committee was mindful of the advice of Mr. Justice Brandeis, recalled by the Court in *Buckley*,

> Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficienct policeman.

424 U.S. at 67, *quoting* L. Brandeis, Other People's Money 72 (1933).

The fact that persuader contact and advice is not itself illegal is not dispositive. What counts is that Congress found a strong connection between corruption in

the labor field and the activities of management persuaders. Similarly in *Buckley* a vast majority of campaign contributions have absolutely no corrupting influence on the political process, yet the Court permitted compelled disclosure of practically all campaign contributions because "disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributors and expenditures to the light of publicity." 424 U.S. at 67. Moreover, disclosure serves the purpose of letting the voters know where their information comes from, and last, but "not least significant, record keeping, reporting and disclosure requirements are an essential means of gathering the data necessary to detect violations of the contribution limitations described above." *Id.* at 67-68.

We find that justifications for the disclosure requirements in the LMRDA remarkably similar to those of the Federal Election Commission Act discussed in *Buckley*. The disclosure permits employees in a labor setting, like voters in an election, to understand the sources of the information being distributed. See also §§ 201, 202, 29 U.S.C. §§ 431, 432 (requiring extensive reporting from labor organizations and their officers). The annual report serves as a crosscheck on the accuracy of the 30 day reports and serves to notify the Secretary of relationships between a persuader and employer which may give rise to a duty to file a 30 day report. More importantly, as we have outlined above, Congress viewed management persuaders as inherently suspect and their activities subject to abuse in an extremely sensitive field. Disclosure is therefore justified as a means of discouraging potential abuse where there is a demonstrated propensity for such abuse. See *United States* v. *Harriss*, 347 U.S. 612 (1954); *Marshall* v. *Stevens People and Friends for Freedom*, —— F.2d ——, 108 LRRM 2024 (4th Cir. 1981).[12]

[12] Our judgment is entirely consistent with the Fourth Circuit's opinion in Marshall v. Stevens People and Friends for Freedom,

Finally, it must be remembered that the evil Congress was addressing was not "persuasion" in and of itself, but the tendency of persuaders to engage in unfair labor practices. Thus, the Act would be less than effective if it permitted the targets of the publicity to be entirely free from public scrutiny where they are able to couch their function as "advice" rather than persuasion. As the Fifth Circuit recognized in *Price*:

> The legislative judgment that one who engages in the persuader business must be subjected to the pressure of revealing publicity is amply justified by the difficulty in distinguishing between those activities that are persuader activities and those that are not, and by the opportunity for misleading concealment of the true nature of such [persuader's] work in situations involving intricate corporate conglomerate associates or, equally pressing, industry wide labor controversies.

412 F.2d at 650.

The Association contends, relying principally on *Familias Unidas* v. *Briscoe*, 619 F.2d 391 (5th Cir. 1980), that while these purposes may justify disclosure of the employers who use persuader services, the Act is unconstitutionally overbroad insofar as it requires report-

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where the court engaged in a similar inquiry and upheld the subpoena power of the Secretary under the same act against first amendment attack. See § 601, 29 U.S.C. § 521. The Fourth Circuit found the broad subpoena power justified by a substantial and well founded Congressional concern with abuse in the labor field sufficient to outweigh the associational claims of the non-employee defendants. *Id.* at 2029-30. The interests advanced by the Secretary "are substantially related to the information that he seeks." Id. We find the same is true of the disclosure requirement. The court did not allow use of the subpoena power, however, to obtain lists of the non-supervisory employees working at J.P. Stevens who organized in opposition to the union. As to them, the court found *no* governmental interest in disclosure because the statute by its very terms maintains protection for *employees* to exercise their section 7 rights—including organizing against a union. *Id.* at 2029.

ing of employers who receive only advice. In *Familias Unidas* the Fifth Circuit struck down a statute requiring disclosure of all members of any organization encouraging interference with the peaceful operation of the public schools. 619 F.2d at 394. The court found the statute overbroad because "the mere presence of an individual's name on an organization's membership rolls is insufficient to impute to him the organization's illegal goals." *Id.* at 401, *quoting United States* v. *Robel*, 389 U.S. 258, 266 n.16 (1967). With respect to people without knowledge of the organization's illegal activity "disclosure bears no relationship at all to the state interest in deterring school disruption." *Id.* at 401.

Defendant's reliance on *Familias Unidas* is misplaced. The Texas statute in question there contained no legislative history; the court assumed its sole rationale was that

> [b]y raising the spectre of public scrutiny and opprobrium for individuals supporting organizations engaged in disruptive activities, section 4.28 is intended to deter participation in, active support of, and affiliation with such groups and activities.

Id. at 400. The organizations in question were essentially political with no past history of any illegal or suspect activities. The court took care to distinguish its holding from cases where the "organizations [have] a demonstrated track record of illicit conduct . . ." *Id.* at 401. *See Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1 (1961); *Bryant* v. *Zimmerman*, 278 U.S. 63 (1928). As we have outlined several times, Congress believed that those who engage in persuader services had just such a track record in the sensitive field of labor-relations.

But more importantly, what defendant fails to recognize is that this is not a membership case at all. Merely belonging to the Association does *not* require reporting. Disclosure under the LMRDA is only triggered by a specific relationship—some type of labor relations con-

tact—with an organization engaged in a suspect activity. By focusing on the employer who receives only advice and no persuader services, defendant has sought to deflect us from the proper subject of the inquiry—the persuader. There are two parties in every agreement which must be disclosed under § 203. While Congress may not have demonstrated a legitimate concern with the employers receiving only advice, it did demonstrate substantial justification for keeping an eye on those who engage in persuader activity—here the Association itself. Thus, unlike the statute in *Familias Unidas*, the scope of the reporting requirement in the Act is tailored to meet a concern articulated by Congress and supported by a compelling state interest. See *California Medical Ass'n*, 101 S. Ct. at 2722-23 n.20.

Finally, the defendant argues vigorously that it does not engage in unfair labor practices or any of the other persuader activities Congress thought were undermining national labor policy; that it is, in short, a good guy:

> The Association has merely promoted its members' common belief in the value of open shops in the printing industry. It has informed its members of new technological, legislative and political developments affecting the printing industry; it has advised its members of good management practices that will prevent employee dissatisfaction and inefficiency; it has sponsored employee benefits competitive with those available through union representation. All of these efforts promote better working conditions and industrial peace. . . . Yet merely because the Association assisted three members by speaking on their behalf directly to their employees, without violating the law or urging others to violate the law, the Secretary now seeks to class the Association with the traditional "union busters" . . .

Defendant's Closing Memorandum at 5.

We express no opinion as to defendant's particular labor relations practices. The record before us does not contain information on how defendant advises its clients, nor does that concern us. Regardless of the Association's business ethics, we are not free to substitute our judgment for the clear expression of Congressional intent. Congress deemed the management middleman who engages in persuasion of employees as inherently suspect; that judgment is supported by adequate findings and operates in a sensitive area of great national interest. The Association fits the Congressional definition of a persuader and it must therefore comply with the Secretary's order and submit the required information.

IV

Defendant urges three other grounds in challenging the statute and the Secretary's order. While we have considered these arguments at length, we deal with them somewhat summarily.

The Association contends that the statute is so vague that it violates the due process clause of the fifth amendment. It suffices to say that the Act is only vague because defendant chooses to make it so. The opinion of the Fourth Circuit in *Douglas* and the Fifth Circuit in *Price* have stood without any change by Congress in the statute since 1965. While we admit that the structure and language of the Act are not a model in legislative drafting, the consistent construction by the courts leaves little doubt as to the proper interpretation of the Act.[13] See

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[13] Defendant argues that neither the courts nor the Secretary have maintained a consistent interpretation of the statute and cite as authority a decision by the District Court for the Eastern District of Virginia in Donovan v. Master Printers Association, No. 80-1040A (E.D. Va. April 15, 1981). Once again, defendant's reliance is misplaced. At issue in that case was the entirely separate question of *whether* the defendant engaged in any persuader activity, not the scope of the duty to report once persuader activity is en-

Grayned v. *City of Rockford*, 408 U.S. 104, 109-10 (1972); *United States* v. *Harris*, *supra*; *United States* v. *Heilmen*, 614 F.2d 1133, 1136-38 (7th Cir. 1980); *Amato* v. *Divine*, 558 F.2d 364, 365 (7th Cir. 1977); *Sheehan* v. *Scott*, 520 F.2d 825, 829 (7th Cir. 1975).

The Association also argues that the reporting requirements constitute an unreasonable search and seizure in violation of the fourth amendment. It makes the point that reporting and disclosure requirements can violate the fourth amendment if they amount to an unreasonable invasion of privacy and are unrelated to any permissible state interest. See *California Bankers Association* v. *Schultz*, 416 U.S. 21 (1974); *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950).

While commercial enterprises benefit from the protection of the fourth amendment, see *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307 (1978); *Camara* v. *Municipal Court*, 387 U.S. 523 (1967), the privacy interest asserted by the defendant is significantly diminished where, as here, we deal with businesses engaged in operation for profit.[14]

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gaged in. The court held that "under the facts of this case MPA, as distinguished from the employers involved, is not undertaking activities which have as an object persuasion of employees." Id. at 1. The court found that *all* of the activities at issue in that case constituted advice.

Further, the policy of the Department of Labor cited by the court deals with defining the difference between advice and persuasion—not the question of what are the reporting obligations of a persuader. Id. at 4. We express no opinion as to whether we agree with the Virginia court on the issue of what constitutes persuasion because that question is not before us.

[14] We note that in certain pervasively regulated industries, where the governmental interest is especially strong and long standing, no showing of probable cause is necessary before a physical search is conducted. Donovan v. Dewey, 101 S.Ct. 2534 (1981); United States v. Biswell, 406 U.S. 311 (1972); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970). Moreover, even where the fourth amendment applies, all the government need show to

The Court has recognized that in a disclosure setting "neither incorporated nor unincorporated associations can plead an unqualified right to conduct their affairs in secret." *California Bankers Association*, at 66-67 *quoting Morton Salt*, at 652. The fourth amendment simply requires that the reporting scheme imposed by the statute bear a reasonable relationship to a permissible subject of governmental inquiry and not place an undue burden on the defendant. *Id.*

It is unnecessary for us to engage in a protracted discussion of the difficult question of whether § 203 amounts to a search and seizure because, as our discussion of the statute and first amendment indicates, there is nothing "unreasonable" about the reporting and disclosure of this Act. *California Bankers Association* at 67-70.[15]

Finally, defendant argues that the government should be estopped from requesting further reports in this case. The estoppel argument is based on a letter from the Department of Labor to the defendant dated June 9, 1978.[16]

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obtain a warrant is that the search is in accord with a reasonable administrative plan in conformity with statutory authority; far less than the traditional probable cause standard. See Marshall v. Barlow's, Inc., 436 U.S. at 320-21.

[15] Defendant bases its argument on the same grounds as its first amendment attack: that the scope of the disclosure requirements bears no relationship to any legitimate state purpose. Defendant's Closing Memorandum at 28-32. Since we have discussed the reasonableness of the reporting requirement at length in our discussion of the first amendment, we do not repeat it here.

[16] The letter relied on by defendant refers to discussions between the Associations's Executive Director and a Department of Labor "Compliance Officer" and describes the contact between the Association and employees on three occasions. The letter states in relevant part:

> You are therefor required to file an LM-20 Agreement and Activities Report for each of the three above-named Companies,

Defendant argues that the letter constitutes a settlement upon which defendant detrimentally relied in filing the 30 day report for the three employers who received persuader services. At this point we adopt the recent statement of Judge Bauer that "[w]e tire of arguments of expediency addressed to us under the guise of principle." *Gibbons* v. *United States*, Slip Op. No. 80-1786 at 8 (7th Cir., Aug. 26, 1981).

While it is no longer true that the government can never be estopped, the "doctrine of estoppel must be applied with great caution to the government and its officials." *United States* v. *Gross*, 451 F.2d 1355, 1358 (7th Cir. 1971). *See also Champaign County* v. *United States*, 611 F.2d 1200, 1205 n. 8 (7th Cir. 1979). This is particularly true where the estoppel would prevent the effectuation of Congressional intent by altering the meaning of a statute. In such a situation estoppel will only be applied on proof of affirmative misconduct on the part of the government causing severe injury to the party affected. *See Leimbach* v. *Califano*, 596 F.2d 300 (8th Cir. 1979); *California Pacific Bank* v. *SBA*, 557 F.2d 218 (9th Cir. 1977); *Santigo* v. *INS*, 526 F.2d 488 (9th Cir.), *cert. denied* 425 U.S. 971 (1975); *cf. United States Immigration & Naturalization Service* v. *Hibi*, 414 U.S. 5 (1973).

In the case at bar we find neither the affirmative misconduct nor the type of injury to the defendant required in order for an estoppel to apply. There is no indication in the letter from the Department to the defendant, nor any other evidence presented to this court, that the parties entered into a settlement of the question being litigated

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along with LM-21 Receipts and Disbursements Reports for each, for respective meetings in 1976.

In view of the fact that these reports were actually due some time ago, we anticipate receiving them no later than thirty days following your receipt of this letter. In this connection your attention is directed to Sections (sic) 210 of the Act, as (sic) copy of which is enclosed.

here. At most the letter could lead defendant to believe its interpretation of the requirements of the Act was correct, despite the holding of the Fourth and Fifth Circuits to the contrary.[17] However, a statement by an employee of a government agency contrary to applicable law cannot operate to bar a correct interpretation of the law except in the most egregious circumstances. *See. e.g., Leimbach* v. *Califano; Simon* v. *Califano*, 593 F.2d 121 (9th Cir. 1979); *Goldberg* v. *Weinberger*, 546 F.2d 477 (2d Cir. 1976), *cert. denied*, 431 U.S. 937 (1977).

Here we find no harm to the defendant resulting from the letter. Defendant has admitted that there is a legal duty to report instances of persuader activity. Yet it argues now that it was prejudiced by the government's action because it filed a report that was restricted to persuader activity. We find no such prejudice. The letter did not hinder defendant in its ability to respond and litigate the scope of the reporting requirements of the Act, nor did it disclose any material other than that to which the government is entitled. This might be a different case were the Secretary seeking sanctions against the defendant for its failure to file prior to the corrected

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[17] We note that this is not a case where the defendant has alleged arbitrary and discriminatory enforcement on the part of the government. Defendant's claim is based solely on the communication by a government employee. Our analysis would be different if defendant had proffered evidence of a discriminatory pattern of enforcement or an agency abuse of discretion in violation of a Congressional scheme. See e.g., Dunlop v. Bachowski, 421 U.S. 560 (1975); Yick Wo v. Hopkins, 118 U.S. 356 (1886).

[18] The evidence presented by defendant shows that it waited one full year before producing the reports requested in the June 9, 1980 letter quoted in note 16. We have examined the forms filed and note that they are one page in length and hardly appear that they would require twelve months to complete. In light of defendant's year long delay in submitting the reports it agreed to send, we hardly think defendant is in a position to appeal to our notion of "equity" and argue the "bad faith" of the government. See Defendant's Exhibits A-C.

notification sent by the Department.[19] As it stands now, the only consequence of the June 8, 1978 communication is that the Association filed the required reports for its persuader clients. It did not, nor has it to this day, filed the required reports for its "advice only" clients. In these circumstances there is no justification for estopping the government from seeking a proper interpretation of the Act and effectuating what Congress believed to be the public interest.

For the foregoing reasons the Secretary of Labor's motion for summary judgment is granted and the Master Printers Association's motion for summary judgment is denied. Defendant is ordered to comply with the Secretary's request to produce the required LM-21 form within 30 days.

ENTER:

/s/ [Illegible]
United States District Judge

Dated: December 10, 1981.

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[19] In contrast to the defendant's delay, the Secretary notified MPA by letter of the need to supplement its report on July 29, 1981, about six weeks after the incomplete reports were filed. To our knowledge, no action, other than this suit to compel compliance with the statute, has been taken against defendant.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

May 12, 1983

Before

HON. WALTER J. CUMMINGS, Chief Judge
HON. WILBUR F. PELL, JR., Circuit Judge
HON. WILLIAM J. BAUER, Circuit Judge
HON. HARLINGTON WOOD, JR., Circuit Judge
HON. RICHARD D. CUDAHY, Circuit Judge
HON. JESSE E. ESCHBACH, Circuit Judge
HON. RICHARD A. POSNER, Circuit Judge
HON. JOHN L. COFFEY, Circuit Judge

No. 82-1459

RAYMOND J. DONOVAN, Secretary of Labor,
United States Department of Labor,
Plaintiff-Appellee,

vs.

MASTER PRINTERS ASSOCIATION, a division of
Printing Industry of Illinois Association,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division
No. 80 C 1768—Prentice H. Marshall, Judge

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *en banc* filed in the above-entitled cause by Defendant-Appellant Master Printers Association, a vote of the active members of the court was requested, and a majority of the active members of the court * have voted to deny a rehearing *en banc*. A majority of the judges on the original panel ** have voted to deny the petition for rehearing. Accordingly,

It is ordered that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable Wilbur F. Pell, Jr., and the Honorable Harlington Wood, Jr., voted to grant a rehearing *en banc*.

** The original panel consisted of Judges Pell, Bauer, and William H. Timbers, Senior Judge of the United States Court of Appeals for the Second Circuit, who sat by designation. Judge Pell voted to grant a rehearing. Judge Timbers did not participate in the consideration of the suggestion for rehearing *en banc*.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Civil Action No. ———

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Plaintiff,

v.

MASTER PRINTERS ASSOCIATION, A DIVISION OF
PRINTING INDUSTRY OF ILLINOIS ASSOCIATION,
Defendant.

COMPLAINT

I

Plaintiff brings this action under Title II of the Labor-Management Reporting and Disclosure Act of 1959 (Act of September 14, 1959, 73 Stat. 519 *et seq.*, 29 U.S.C. 401 *et seq.*, hereinafter referred to as the Act.

II

Jurisdiction of this action is conferred upon the Court by section 210 of the Act (29 U.S.C. 440).

III

Defendant is, and at all times relevant to this action has been, a division of the Printing Industry of Illinois, an unincorporated trade association with its principal office located at 20 East Ontario Street, in the City of Chicago, County of Cook, State of Illinois, within the jurisdiction of this Court.

IV

Defendant is, and at all times relevant to this action has been, an association of employers engaged in an industry affecting commerce within the meaning of sections 3(e) and 203(a) of the Act (29 U.S.C. 402(e), and 433(a), and is a person within the meaning of section 3(d) of the Act (29 U.S.C. 402(d)).

V

Defendant, through its Executive Director, Robert Lindgren, pursuant to agreements and arrangements with three of its employer-members undertook activities, an object of which was to persuade employees to exercise or not to exercise, or to persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing.

VI

On July 11, 1979, pursuant to section 203(b) of the Act (29 U.S.C. 433(b)), defendant filed with the plaintiff:

(a) three labor relations consultant reports designated by the Secretary of Labor as Form LM-20, Agreement and Activities Report, signed by Robert Lindgren which indicated that defendant had engaged in activities designed to persuade employees to exercise or not to exercise, or to persuade employees as to the manner of exercising, the right to organize and bargain collectively through representatives of their own choosing; and

(b) a labor relations consultant report designated by the Secretary of Labor as Form LM-21, Receipt and Disbursements Report, covering the period January 1 through December 31, 1976, which listed three employers from whom defendant received payments in connection with labor relations advice or services regardless of the purposes of the advice or services.

VIII

Defendant, during the period January 1 through December 31, 1976, received payment for labor relations

advice or services from employers which receipts were not acknowledged in the aforementioned Receipts and Disbursements Report filed with the plaintiff on July 11, 1979.

IX

Defendant has failed and refused after requests made by plaintiff's officers and agents to file a corrected Receipts and Disbursements Report for the fiscal year ending December 31, 1976, as required by sections 203(b) and 207(b) of the Act (29 U.S.C. 433(b) and 437(b) and the Rules and Regulations promulgated by the Secretary of Labor pursuant to section 208 of the Act (29 U.S.C. 438) and published in 29 C.F.R. 406.

WHEREFORE, plaintiffs prays for judgment:

(a) directing and compelling defendant to file an adequate and complete Receipts and Disbursements Report for the fiscal year ending December 31, 1976, as provided by sections 203(b) and 207(b) of the Act (29 U.S.C. 433(b) and 437(b)), and regulations promulgated by the plaintiff pursuant to the Act;

(b) enjoining and restraining defendant from further violating any of the provisions of sections 203(b) and 207(b) of the Act (29 U.S.C. 433(b) and 437(b) and by future failure and refusal to file the reports required to be filed with the Secretary of Labor by said sections of the Act;

(c) for the costs of this action; and

(d) for such other relief as may be appropriate.

Respectfully submitted,

THOMAS P. SULLIVAN
United States Attorney

By:

MICHAEL S. O'CONNELL
Assistant United States Attorney

STATE OF ILLINOIS)
) s.s.
COUNTY OF COOK)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

Judge Prentice H. Marshall

Civil Action No. 80 C 1768

RAY MARSHALL, Secretary of Labor,
United States Department of Labor,
Plaintiff,

v.

MASTER PRINTERS ASSOCIATION, A Division of
Printing Industry of Illinois, Association,
Defendant.

AFFIDAVIT OF ROBERT LINDGREN

I Robert Lindgren, being first duly sworn, depose and state as follows:

1. I am the General Manager of the Printing Industry of Illinois/Indiana Association. I have held that position since or or about September 1979.

2. From approximately January 1979 to September 1979 I was the Executive Director of Master Printers Association ("the Association"), the defendant in the above-captioned case. I am thoroughly familiar with the activities of the Association during that period and up to the present date.

3. The Master Printers Association is an association of employers in the printing industry. None of the Association's members have collective bargaining agreements with any union. The purpose of the Association is to protect and further the members' shared belief that progressive open shops provide the greatest opportunity for employers to create new and better graphic arts products and services for their customers and to promote the most satisfying and rewarding working life for their employees.

4. In furtherance of these common goals, the Association, for many years, has provided a variety of services to its members. The Association has conducted meetings, distributed literature and engaged in counselling individual members designed to inform and advise member employers concerning trends in technology, good and progressive open shop labor relations, and wages, benefits and working conditions in the printing industry. The Association has also developed and sponsored an employee credit union, and group employee benefit programs for health and welfare insurance and dental care. These group plans are intended to permit members to offer their employees fringe benefits which are competitive with benefits available in union shops in the local printing industry. In addition, as a continuous service to its members, the Association advises its members of recent statutory, regulatory and interpretive developments in the areas of environmental protection, occupational safety and health, minimum wage and overtime, child labor and equal employment opportunity.

5. The Association is a division of a non-profit organization, exempt from taxation under Section 501 of the Internal Revenue Code. The only income the Association receives is the annual dues paid by its members. The amount of dues is determined on a sliding scale based solely on the size of the employer, and does not depend on the degree of an employer's participation in any particular educational or industry-promotional program. Although

Association members pay contributions or premiums to group benefit plans if they elect to cover their employees under these plans, these contributions and premiums are used *solely* to provide health, welfare and dental care benefits under the plans and do not go into the operating funds of the Association, except in the form of direct reimbursement for the expenses of operating the plans.

6. In Autumn 1976, I made three speeches to members' employees, in the course of my duties as Executive Director. In each of the three instances, a member employer approached the Association and specifically requested that I speak to the member's employees concerning their rights to organize or to refrain from organizing for collective bargaining. In each case, the employer determined the content of and approved my talk in advance. In each case, I gave a single talk to the employer's assembled employees. The Association and I received no separate payment or fee for giving these talks.

7. On April 4, 1978, I attended a meeting with a Department of Labor Compliance Officer, the Association's attorney and another Department official whose identity is not known. At this meeting, the Department investigated the nature of the Association's activities and the three talks in particular. Thereafter, the Compliance Officer advised the Association's attorney by telephone that the Department had determined that the three talks were "persuader activity" and that the Association would be required to file reports pursuant to Section 203(b) of the Labor Management Reporting and Disclosure Act.

8. On or about June 9, 1978, I received a letter from Gerald H. Johnson, the Acting Area Administrator for the Chicago area office of the Labor-Management Services Administration summarized the Department's determination and concluded:

> You are therefore required to file an LM-20 Agreement and Activities Report for *each of the three*

above-named companies, along with LM-21 Receipts and Disbursements Reports *for each*, for the fiscal year covering the dates of the respective meetings in 1976.

A copy of that letter is attached as Defendant's Exhibit E.

9. In reliance upon this agreement, and with the understanding that it was fully discharging its statutory reporting obligations for fiscal year 1976, the Association filed four reports: 30-day reports, one for each of the three employers named by the Department of Labor, and one annual report. Pursuant to its agreement with the Department of Labor, the Association included in its annual report only the receipts and disbursements which arguably could be identified with labor relations services performed for or on behalf of the three named employers. Copies of these reports are attached as Defendant's Exhibits A, B, C, and D respectively.

10. The Association filed these reports despite its serious questions as to the validity of the Department's determination that the Association was required to file under Section 203(b).

11. On or about July 26, 1979, I received a letter from Carl Rolnick, Director of the Department's Office of Labor-Management Standards Enforcement in Washington, D.C. in which Mr. Rolnick advised the Association that the submitted forms were insufficient and that the Department would now require that the Association file an annual report for *all* of its approximately 800 member employers. A copy of this letter is attached as Defendant's Exhibit F.

12. On or about February 25, 1980, the Association by its attorney, Jerry Kronenberg, acting at my direction, sent a letter to Mr. Rolnick, reminding him of the prior agreement and seting forth the Association's position that it had fully complied with the agreement to settle the

matter. A copy of this letter is attached as Defendant's Exhibit G.

11. On or about April 10, 1980, I received from Mr. Rolnick's successor, Richard G. Hunsucker, a letter in which Mr. Hunsucker responded that no settlement agreement had been made, and that the Department's June 9, 1978 letter confirming the agreement "may be technically incorrect which we assume may have occurred due to some clerical errors", and "in no way can that be considered a settlement agreement between the Department and the Association." In this same letter, Mr. Hunsucker advised the Association that the Department had commenced this action to compel the Association to file a revised form. A copy of this letter is attached as Defendant's Exhibit H.

12. Ever since the Association learned in 1977 or 1978 that the Department interpreted Section 203(b) to require the disclosure of the Association's membership lists, the Association, at my direction, has scrupulously refrained in engaging in speeches to employees or any activity that might arguably constitute persuader activity within the meaning of Section 203(b)(1).

FURTHER AFFIANT SAYETH NOT.

/s/ Robert Lindgren
ROBERT LINDGREN

Subscribed and sworn to before me this 3rd day of February, 1981

/s/ [Illegible]
Notary Public